

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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April 11, 2000

Opinion No. 00-068

Constitutionality of Limiting Minor's Access to Video Games

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**QUESTIONS**

1. Is Senate Bill 2213, as drafted, constitutionally defensible?
2. Is the amendment to Senate Bill 2213 (drafting code #01222975), as drafted, constitutionally defensible? If not, why not?

**OPINIONS**

1. No. Senate Bill 2213 is not constitutional, as drafted. The language contains an unauthorized delegation of legislative authority and contains vague references in its definition of "graphic violence."
2. No. The amendment to Senate Bill 2213 is not constitutional. The amendment addresses the constitutional infirmities of the original bill. However, the definition of "graphic violence" included in the amendment may be overbroad. In addition, the original bill and the amendment do not require scienter, thus making the statute susceptible to a constitutional challenge.

**ANALYSIS**

1. This office has addressed the constitutionality of the original bill in an opinion recently issued by this office. Attached is a copy of Attorney General Opinion No. 00-060.
2. The proposed amendment revises section (b)(1), as follows:

A person commits an offense who sells, rents or otherwise provides for use for a fee any video or computer software game to a minor which contains scenes or depictions of graphic violence.

By deleting any reference to the Entertainment Software Rating Board, the amendment no longer contains an unauthorized delegation of legislative authority. Further, the proposed amendment includes a more in-depth definition of graphic violence:

(2) “Graphic violence” means explicitly violent behavior. A video or computer software game includes “graphic violence” if it contains scenes or depictions of one (1) or more of the following.

- (A) Any decapitation of a human being;
- (B) Any dismemberment of other body parts or organs from a human being;
- (C) Any blood loss from a human being; or
- (D) Any shooting or simulated shooting of a human being.

The new definition more clearly defines the kinds of conduct and injuries which proscribe the sale or rental of video and computer games to minors. However, the amended definition may be subject to a constitutional challenge based on overbreadth. *See New York v. Ferber*, 458 U.S. 747 (1982). For example, by restricting a minor’s access to video and computer software games that include “[a]ny blood loss from a human being”, the legislation would arguably extend to software games that include realistic portrayals of athletic competitions or depict historical battles -- games outside the scope of this legislation.

In addition, the language in both the original bill and the amendment fails to require scienter. The United States Supreme Court has held that strict liability for obscenity dissemination crimes is unconstitutional because it might result in an infringement upon protected speech. *Smith v. California*, 361 U.S. 147 (1959). Similarly, creating a strict liability crime for the dissemination of videos containing “graphic violence” would likely be unconstitutional. *Contrast* Tenn. Code Ann. §39-17-911(a) (“It is unlawful for any person to **knowingly** sell or loan for monetary consideration or otherwise exhibit or make available to a minor: . . . any picture, photograph, . . . which depicts nudity, sexual conduct . . . . (emphasis added)).

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